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No. 70-313

In the Supreme Court of the United States

OCTOBER TERM, 1971

AMBROSE DISTRIBUTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
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National Labor Relations Board,
Washington, D.C. 20570.

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In February 1965 the Board found that the Company, a wholesale trucking firm, had violated Section 8(a)(3) and (1) of the Act by discharging Richard Byrd and Thomas Smith to discourage their union activities; it ordered the Company, *inter alia,* to offer reinstatement and reimburse them for any loss of pay suffered as a result of the unfair labor practices. 150 NLRB 1642. The court of appeals upheld the Board's decision and enforced its order, 358 F.2d 319 (C.A. 9), certiorari denied, 385 U.S. 838. On July 26, 1967, the court of appeals held the Company in civil contempt for failing to offer full reinstatement. 382 F.2d 92, 95 (C.A. 9).

The Company and the Board's Regional Director were thereafter unable to agree upon the amounts of

backpay due and the Regional Director instituted the instant backpay proceeding. Following a hearing, the Board found that employee Byrd[1] was entitled to backpay of $12,466 plus 6 percent interest, for the period from March 12, 1964 (the date of his discharge) until August 20, 1967 (the day before his reinstatement) (R. 140, 117–119). The court of appeals upheld the award (Pet. App. 13–16).

The sole question presented by the petition is whether the Board's backpay formula was arbitrary. The method utilized involved the selection of all drivers who worked exclusively for the Company and received earnings[2] in each bi-monthly pay period of the last full quarter (the final calendar quarter of 1963) during which Byrd worked prior to his discharge. An average was taken of the earnings of all drivers in this group for each subsequent calendar quarter. From these amounts, the Board computed Byrd's backpay, deducting his earnings from other employment, reduced by appropriate travel expenses (R. 121, 124–125).

The ruling of the Board rests on substantial evidence and further review is not warranted. The Board has wide discretion to devise an appropriate backpay formula to reimburse employees for losses occasioned

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[1] At the hearing, the parties reached a settlement as to the backpay for Smith (R. 117 and n. 4). "R." refers to Volume I of the Record in the court below which is Volume 2 of the materials lodged with this Court. Volume 2 includes the decisions of the Trial Examiner and the Board. "Tr." refers to the transcript of testimony contained in Volume 2 of the record below (Volume 4 as lodged here); "Ex." refers to Exhibits filed below (Volume I as lodged with the Clerk this Court).

[2] The Company's drivers are paid only for mileage actually driven (R. 121, n. 16; Tr. 51).

by unfair labor practices. *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198–199; see also, *National Labor Relations Board* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 and the concurring opinion of Mr. Justice Douglas at 396 U.S. 266. The representative group formula has been used by the Board in past cases (*e.g.*, *Venetian Blind Workers' Union*, 110 NLRB 780, 786; *Oman Construction Co., Inc.*, 141 NLRB 1534, 1536, affirmed, 338 F. 2d 125 (C.A. 6)) and was a reasonable basis here. It reflected normal fluctuations in earnings among seasoned drivers while at the same time prevented possible distortions which would have resulted from enlarging the group to include new, untrained and temporary employees.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

EUGENE G. GOSLEE,
Acting General Counsel,
National Labor Relations Board.

JULY 1971.

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[3] Petitioner's contention that the Board's formula did not take into account Byrd's history of irregular employment at the Company ignores the evidence that, while Byrd's first four years of employment were irregular, he worked "quite steadily" for the eight months immediately preceding his discharge (R. 124; Tr. 70. 111–114; R. Ex. 3).

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